

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 11 Case
)	Number <u>90-41092</u>
JOHN C. VAN PUFFELEN)	
)	
Debtor)	
_____)	
)	
RESOLUTION TRUST CORPORATION,)	
RECEIVER FOR GREAT SOUTHERN)	FILED
FEDERAL SAVINGS & LOAN)	at 5 O'clock & 43 min. P.M.
ASSOCIATION)	Date: 3-31-92
)	
Plaintiff)	
)	
vs.)	
)	
JOSEPH C MULLER,)	
JOHN C. VAN PUFFELEN AND)	
SAVANNAH MARINE SERVICES, INC.)	
)	
Defendants)	

ORDER AND JUDGMENT

Plaintiff, Resolution Trust Corporation ("RTC"), receiver for Great Southern Federal Savings and Loan Association, brought this adversary proceeding against Joseph C. Muller ("Muller"), John C. Van Puffelen ("Van Puffelen"), debtor-in-possession in the underlying Chapter 7 case, and Savannah Marine Services, Inc.

("Savannah Marine")¹ seeking a determination that it holds a perfected first lien on and is entitled to proceeds from the sale of property of the bankruptcy estate, and reasonable attorneys' fees and costs pursuant to 11 U.S.C. §506(b). Muller counterclaimed against RTC. Van Puffelen and Savannah Marine cross-claimed against Muller. By order dated July 29, 1991, trial of this adversary proceeding was consolidated with hearing on Van Puffelen's objection to Muller's proof of claim filed in the underlying Chapter 11 case and Savannah Marine's objection to Muller's proof of claim filed in its companion case, In re: Savannah Marine Services, Inc., Ch. 11 case No. 90-41093 LWD, which objections raise the same issues presented in the cross-claim. Based on the evidence presented at trial and relevant legal authorities, I make the following findings.

FINDINGS OF FACT

The relevant facts are summarized as follows. On June 19, 1990 Van Puffelen filed a petition under Chapter 11 of the Bankruptcy Code. As of the date of the petition, Van Puffelen owned a .173 acre tract of real estate in Chatham County, Georgia fronting the Savannah River and an attached marine dock, known to the parties at the "dock tract." (The .173 acre tract and dock will hereinafter

¹Savannah Marine was not named as a defendant in the original complaint, but was added as a party defendant by order dated July 26, 1991.

be referred to collectively as the "dock tract.") The "tank tract" is a 15.894 acre tract of real estate located behind the dock tract in relation to the river, connected to the dock tract only by an easement of right-of-way.

Van Puffelen filed in the underlying Chapter 11 case an application to sell the dock tract. The application was approved by order dated September 28, 1990 and the dock tract was sold free and clear of all liens for Three Hundred Twenty Thousand and No/100 (\$320,000.00) Dollars (hereinafter sometimes referred to as "the proceeds"), with valid liens to attach to the proceeds. The proceeds, which are the subject of this adversary proceeding, were deposited in the court registry. RTC asserts a first lien against the entire proceeds and seeks turnover of the funds. Muller contends RTC's lien is limited to One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars and asserts that he is entitled to One Hundred Fifty-Two Thousand Five Hundred Ninety-Nine and 57/100 (\$152,599.57) Dollars of the proceeds, asserting a secured interest in the proceeds. Van Puffelen and Savannah Marine dispute the amount and validity of Muller's claim.

RTC's CLAIM

By various notes, renewals thereof, and a guaranty

agreement, Van Puffelen become indebted to Great Southern Federal

Savings Bank ("Great Southern"), predecessor in interest to RTC,² for Three Hundred Forty-Six Thousand Two Hundred Sixty-Nine and 39/100 (\$346,269.39) Dollars.³ On April 3, 1987 Van Puffelen

²On June 21, 1989 the Federal Home Loan Bank Board (the "Board") determined Great Southern was insolvent and appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Great Southern. Pursuant to 12 U.S.C. §1729(a) (repealed) the Board created Great Southern Federal Savings and Loan Association ("Great Southern Association") as a federally-chartered mutual association. Great Southern Association acquired the assets of Great Southern pursuant to an acquisition agreement dated June 21, 1989. On the same date, the Board appointed the FSLIC as conservator for Great Southern Association. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, §401(a); 103 Stat. 183, 354 (1989), abolished the FSLIC and substituted in its place the Federal Deposit Insurance Corporation ("FDIC") to dispose of all assets held by the FSLIC. Under FIRREA, which became law on August 9, 1989, RTC possesses the same rights and powers concerning depository institutions in receivership or conservatorship as the FDIC has under 12 U.S.C. §§1821, 1822 and 1823 Id. at 370. On June 22, 1990, the Office of Thrift Supervision, successor in interest to the Board under FIRREA, appointed RTC as receiver for Great Southern Association, replacing RTC as conservator for Great Southern Association.

³Van Puffelen's current indebtedness to RTC, successor in interest to Great Southern, is based on the following debt instruments:

- (1) a note dated March 6, 1989 (renewing a note dated February 1, 1985) executed by Van Puffelen and his wife, Mary Van Puffelen, in favor of Great Southern for \$75,000.00;
- (2) a note dated July 10, 1987 (renewing a note dated April 4, 1987) executed by Van Puffelen in favor of Great Southern for \$600,000.00
- (3) a guaranty dated August 5, 1987 executed by Van Puffelen

executed a deed to secure debt in favor of Great Southern which covered, among other things, the .173 acres tract of land included in the "dock tract." The deed to secure debt provides that the deed secures

(a) the repayment of the indebtedness evidenced by the [April 3, 1987 note], with interest thereon, the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Deed, and the performance of the covenants and agreements of Borrower herein contained, and (b) the repayment of any future advances, renewals, and any other indebtedness no matter when or how created, with interest thereon, made to Borrower by Lender . . . , Borrower does hereby mortgage, grant and convey to Lender the following described property located in the County of Chatham, State of Georgia.⁴
. . . .

It is undisputed that the deed to secure debt was properly recorded on April 3, 1987 in the office of the Clerk of Superior Court, Chatham County, Georgia, in accordance with Georgia law.

in favor of Great Southern in the amount of \$125,000.00 guaranteeing a note to Great Southern by Islands Charter Service, Inc.;

(4) a note dated January 11, 1989 (renewing a note dated September 9, 1987) executed by Van Puffelen and H. Ronald Freeman in favor of Great Southern for \$100,000.00;

(5) a note dated January 25, 1989 (renewing a note dated October 6, 1988) executed by Van Puffelen in favor of Great Southern for \$67,000.00.

Among the assets transferred to RTC (see note 2, supra) were the debt instruments described above. It is undisputed that the aggregate outstanding balance of Van Puffelen's obligations under the above described debt instruments is \$346,269.39.

⁴The deed to secure debt references an attached exhibit which describes the tank tract and the dock tract.

On April 3, 1987, Van Puffelen also executed a security agreement in favor of Great Southern covering "[t]he inventory, trade fixtures, docks, pilings, walkways, dolphins, moorings, pipeways, platforms, and related equipment located at or attached to the premises described [as the tank tract and the dock tract]." The security agreement further provides that the collateral described secures a note executed by Van Puffelen in favor of Great Southern and "all obligations of [Van Puffelen] hereunder, and all other obligations of [Van Puffelen] to [Great Southern], its successors and assigns, however created, arising or evidenced, whether direct or indirect, absolute or contingent, or now or hereafter existing, or due or to become due." It is undisputed that Van Puffelen properly executed a UCC-1 financing statement covering the collateral described in the security agreement and properly filed it in the office of the Clerk of Superior Court, Chatham County, Georgia in accordance with Georgia law.

MULLER'S CLAIM

Muller formerly owned and operated Joseph C. Muller, Inc. ("Muller, Inc."), an insurance business and real estate firm located in Savannah, Georgia. On December 31, 1986, Muller sold all of his stock in Muller, Inc. to Atlantic Investors Insurance Agency, Inc.

("Atlantic Investors") for Five Hundred Forty-Five Thousand and No/100 (\$545,000.00) Dollars, which included a cash payment of Two Hundred Thousand and No/100 (\$200,000.00) Dollars and promissory note for Three Hundred Forty-Five Thousand and No/100 (\$345,000.00) Dollars. On June 1, 1987, the promissory note was replaced by a new

note "the June 1, 1987 note") executed by Atlantic Investors, Lombard International Group, Ltd. and Harland H. Hostetter, as co-makers, for Two Hundred Forty-Five Thousand and No/100 (\$245,000.00) Dollars.⁵ Savannah Marine executed a guaranty of the June 1, 1987 note, limited to One Hundred Thousand and No/100 (\$100,000.00) Dollars. To further secure the June 1, 1987 note, Van Puffelen executed a deed to secure debt conveying to Muller a security interest in the tank tract and the dock tract.⁶ The deed to secure debt provides that the conveyance "is subject and subordinate to a certain first priority Deed to Secure Debt granted by Grantor [Van Puffelen] to Great Southern Federal Savings Bank securing a loan in the amount of \$600,000.00 as recorded in the Office of the Clerk of Superior Court of Chatham County, Georgia on April 3, 1987. . . . " It is undisputed that Muller's deed to secure debt was properly

⁵A cash payment of \$100,000.00 was made reducing the outstanding obligation on the prior note to \$245,000.00.

⁶Van Puffelen is not personally liable on the June 1, 1987 note.

recorded on June 10, 1987 in the office of the Clerk of Superior Court, Chatham County, Georgia in accordance with Georgia law. On October 28, 1988, Muller and Van Puffelen filed a notice of claim of lien disclosing Muller's security interest in the real estate records of the Clerk of Superior Court, Chatham County, Georgia. No such notice was filed in the personal property indices.

In 1988, Van Puffelen sought sell the tank tract. As the available sale proceeds were insufficient to pay off Great Southern much less Muller, to allow the sale, Muller executed a quit-claim deed dated November 1, 1988 releasing his second lien on the tank tract. On November 2, 1988, Great Southern, through its agent,⁷ executed an affidavit providing in part as follows:

I, Michael W. Lee, authorized agent of Great Southern Federal Savings Bank, . . . do hereby state that Great Southern Federal Savings Bank currently holds a Deed to Secure Debt on [the dock tract]. Said Deed to Secure Debt is currently in the amount of One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars. . . . Great Southern Federal Savings Bank agrees not to increase above One Hundred Fifty Thousand Dollars (\$150,000.00), the Deed to Secure Debt on said property and waives any right in said property other than the Deed to Secure Debt in the amount of One Hundred Fifty Thousand Dollars (\$150,000.00).

(This affidavit will hereinafter be referred to as the "Lee

⁷There is no dispute as to the authority of the agent, Michael W. Lee, to act on behalf of Great Southern.

affidavit.") However, the deed to secure debt held by Great Southern was not modified of record. Muller's release of his second lien on the tank tract was in reliance on the Lee affidavit.

THE OBJECTIONS TO CLAIMS

As part of the consideration for the purchase of Muller, Inc., Muller promised the purchasers that earned commission revenues for 1987 from the insurance business of Muller, Inc. would equal or exceed Three Hundred Ten Thousand and No/100 (\$310,000.00) Dollars.

A stock purchase agreement executed in connection with the purchase of Muller, Inc. provides that the purchaser is entitled to a credit against the balance owing on the June 1, 1987 note to the extent the commissions earned during 1987 are less than Three Hundred Ten Thousand and No/100 (\$310,000.00) Dollars. It is undisputed that the balance owed on the June 1, 1987 note is One Hundred Fifty-Two Thousand Five Hundred Ninety-Nine and 57/100 (\$152,599.57) Dollars. Muller contends earned commission revenues in 1987 were Three Hundred Sixty-Five Thousand One Hundred Seventy-Nine and 09/100 (\$365,179.09) Dollars. Muller asserts that because the earned insurance commissions for 1987 exceed Three Hundred Ten Thousand and No/100 (\$310,000.00) Dollars, under the terms of the stock purchase agreement, no credit against the balance of the June 1, 1987 note

should be extended. Van Puffelen and Savannah Marine contend earned commission revenues for 1987 were Two Hundred Forty-Seven Thousand Four Hundred Forty-Three and 13/100 (\$247,443.13) Dollars, leaving a short fall of Sixty-Two Thousand Five Hundred Fifty-Six and 87/100 (\$62,556.87) Dollars.

The parties presented extensive testimony and documentary evidence supporting their contentions regarding the actual commission revenues in 1987. Having heard the testimony and observed the demeanor of all the witnesses and reviewed the extensive documentary evidence submitted, I find the actual commission revenues for 1987 were at least Three Hundred Ten

Thousand and No/100 (\$310,000.00) Dollars.

Muller filed a proof of claim in the underlying Chapter 11 case for One Hundred Fifty-Two Thousand Five Hundred Ninety-Nine and 57/100 (\$152,599.57) Dollars based on "a claim on [a] Note secured by [a] Deed to Secure Debt." Muller filed a proof of claim in In re: Savannah Marine Services, Inc., supra, for One Hundred Thousand and No/100 (\$100,000.00) Dollars based on Savannah Marine's guaranty executed in connection with the June 1, 1987 note. Van Puffelen and Savannah Marine objected, respectively, to Muller's proof of claim in the underlying case and Muller's proof of claim in

In re: Savannah Marine, supra.⁸

THE ADVERSARY PROCEEDING

On November 30, 1990, RTC initiated this adversary proceeding seeking turnover of the entire proceeds in the court registry, Three Hundred Twenty Thousand and No/100 (\$320,000.00) Dollars, plus accrued interest, based on its first lien position.

Defendant Muller counterclaimed contending the Lee affidavit executed by Great Southern is binding on RTC, limiting RTC's lien on the proceeds to One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars, and seeking turnover of One Hundred Fifty-Two Thousand Five Hundred Ninety-Nine and 57/100 (\$152,599.57) Dollars, plus interest, from the court registry based on his asserted lien interest in the proceeds. Van Puffelen and Savannah Marine filed an amended cross-claim⁹ against Muller objecting to Muller's proof of

⁸In In re: Savannah Marine Services, Inc., supra, Savannah Marine objected to Muller's proof of claim contending his claim does not exceed Sixty-Four Thousand Three Hundred Forty-Eight and No/100 (\$64,348.00) Dollars. In the underlying Chapter 11 case, Van Puffelen objected to Muller's proof of claim contending Muller's claim does not exceed Sixty-Seven Thousand Eight Hundred Seventy Five and 13/100 (\$67,875.13) Dollars. By amendment to his objection to claim, Van Puffelen asserted Muller's claim should be limited to Sixty-Four Thousand Three Hundred Forty-Eight and No/100 (\$64,348.00) Dollars. By a final amendment to his objection to claim, Van Puffelen asserts that Muller's claim should not be allowed in any amount, contending there is no indebtedness.

⁹Initially, Van Puffelen filed a cross-claim against Muller; the cross-claim was amended to include Savannah Marine as a cross-claimant once Savannah Marine was added as a party defendant.

claim in the underlying case and Muller's proof of claim filed in In re: Savannah Marine Services, Inc., supra.

RTC contends the Lee affidavit is unenforceable under 12 U.S.C. §1823(e) (1989). Muller contends 12 U.S.C. §1823(e), which was amended in 1989 by FIRREA to apply to the FDIC (here RTC, see footnote 2, supra) in its receivership as well as its corporate capacity, cannot be applied retroactively to defeat the Lee affidavit dated November 2, 1988. Muller argues alternatively that the claim of RTC, as successor in interest to Great Southern, should be equitably subordinated to his claim pursuant to 11 U.S.C. §510. The parties raise the following issues:

- 1) Does the Lee affidavit satisfy the requirements of 12 U.S.C. §1823(e) (1989)?
- 2) Can 12 U.S.C. §1823(e) (1989) be applied retroactively in this case?
- 3) Should RTC's claim to the proceeds be equitably subordinated to Muller's claim pursuant to 11 U.S.C. §510?

CONCLUSIONS OF LAW

But for 12 U.S.C. §1823(e), the parties assume that the Lee affidavit is binding under Georgia law Great Southern and its successor in interest, RTC. However, 12 U.S.C. §1823(e) provides:

Agreements against interests of Corporation [the FDIC]. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under

this section or section 1821 [of title 12], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement -

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously from the time of its execution, an official record of the depository institution.

"The clear purpose of [12 U.S.C. §1823(e)] is to protect the funds of the FDIC [here the RTC] in the public interest of maintaining solvency for the regulated institutions and maintaining solvency of the government agency." FDIC v. Dalba, 1990 WL 43750 p. 4 (W.D.

Wis Feb. 27, 1990). Section 1823(e) is a codification of the common law doctrine established in D'Oench Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.E.2d 956 (1942) and its progeny. In D'Oench, Duhme the Supreme Court held that a "secret agreement," an agreement not found on the face of the loan document, is unenforceable based on "federal policy to protect [FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [FDIC] insures or to which it makes loans." D'Oench, Duhme, supra,

62 S.Ct. at 679. The D'Oench, Duhme, doctrine has been applied "'to bar nearly every defense by the maker of a note against the FDIC or FSLIC,"' RTC v. Smith, CV489-167 slip op. at 5 (S.D. Ga. Alaimo, J. April 6, 1990) [quoting FSLIC v. Locke, 718 F.Supp. 573, 582 (W.D. Tex. 1989)], including "the affirmative defenses of waiver [and] estoppel. . . ." Twin Const.. Inc. v. Boca Raton. Inc., 925 F.2d 378, 382 (11th Cir. 1991). Because the aims of 12 U.S.C. §1823(e) and D'Oench, Duhme are identical, defenses premised under 12 U.S.C. §1823(e) and D'Oench, Duhme are construed "in tandem." Id.

Muller does not argue that 12 U.S.C. §1823(e) (1989), if applicable, does not defeat the Lee affidavit. Under §1823(e) (1989), the Lee affidavit is clearly unenforceable against RTC. Though the Lee affidavit is in writing, 12 U.S.C. §1823(e)(1), it was not signed by Muller, a "person claiming an adverse interest," or Van Puffelen, the "obligor." 12 U.S.C. §1823(e)(2). Moreover,

there is no evidence before me that the board of directors or loan committee of Great Southern approved the Lee affidavit and indicated so in the corporate minutes, 12 U.S.C. §1823(e)(3), or that the Lee affidavit has been an "official record" of Great Southern continuously since its execution. 12 U.S.C. §1823(e)(4).

Muller argues, however, that 12 U.S.C. §1823(e)(1989)

should not be applied retroactively to defeat the Lee affidavit.¹⁰ Muller contends retroactive application of the statute will result in a manifest injustice. See Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.E.2d 476 (1974) (holding, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary").

Unfortunately, neither §1823(e) (1989), nor its legislative history, see Pub. L. 101-73, 217 sub.(4), contains any directive to apply the statute only prospectively, nor any express provision permitting retroactive application. The Eleventh Circuit Court of Appeals has, however, applied the statute retroactively, Twin Const. Inc., supra; Savers Federal Sav. & Loan Ass'n v. Amberly

Huntsville. Ltd., 934 F.2d 1201 (11th Cir. 1991), as has the district court in this district. Smith (Alaimo, J.), supra. Accord FDIC v. Wright, 942 F.2d 1089 (7th Cir. 1991); RTC v. Dismuke, 746 F.Supp. 104 (N.D. Ga. 1990); FDIC v. Engel, 746 F.Supp. 1223 (S.D. N.Y. 1990); FDIC v. British-American Corp., 744 F.Supp. 116 (E.D.

¹⁰As of the date Great Southern executed the waiver agreement, November 2, 1988, 1823(e) did not apply to the FDIC in its capacity as receiver but applied only to the FDIC only in its corporate capacity under 12 U.S.C. §1811. In 1989, 1823(e) was amended, extending applicability of the statute to "a receiver of any insured depository institution," 12 U.S.C. §1823(e) (1989), which includes the RTC in this case.

N.C. 1990); FDIC v. Sullivan, 744 F.Supp. 239 (D. Colo. 1990); FDIC v. Carter, 1990 WL 209626 (E.D. Okla. 1990); Dalba, supra; Queen v. First Service Bank for Sav., 129 B.R. 5 (Bankr. D. N.H. 1991). Contra In re: Woodstone Ltd. Partnership, 133 B.R. 678 (Bankr. E.D. N.Y. 1991).

Muller's argument that retroactive application of 12 U.S.C. §1823(e) (1989) will result in manifest injustice under Bradley, supra, is unpersuasive. "Retroactive application of a new law results in manifest injustice when the disappointment of private expectations outweighs the public interest in enforcing a new rule." Dalba, supra, at 3 [citing Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F.Supp. 1100, 1112 (N.D. Ill. 1988)]. Accord Engel, supra, at 1224. There are "substantial public concerns" which favor retroactive application of the statute. Dalba, supra, at 3. Accord Sullivan, supra, at 241. Although Muller relied on the Lee affidavit in releasing his second lien on the tank tract, loss of this private expectation does not, based on the above-cited authorities, constitute a "manifest injustice" under Bradley in light of the substantial public interest which the statute is

designed to protect. See generally Dalba, supra.

Muller also contends that under Georgia law he held a vested property interest in the Lee affidavit because he forfeited

his security interest in the tank tract relying on the Lee affidavit. Muller argues that applying 12 U.S.C. §1823(e) (1989) retroactively to defeat the terms of the Lee affidavit constitutes a taking of property without compensation in violation of the Fifth Amendment of the United States Constitution. Muller's Fifth Amendment argument is also unpersuasive. Whatever property rights Muller may have held by virtue of the Lee affidavit under Georgia law, the fact that 12 U.S.C. §1823(e) (1989) renders the terms of the Lee affidavit unenforceable does not constitute a taking in violation of the Fifth Amendment. FSLIC v. Griffin, 935 F.2d 691, 699 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1163, ___ L.E.2d ___ (1992); Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1248 (5th Cir. 1990); FDIC v. State Bank of Virden, 893 F.2d 139, 144 (7th Cir. 1990); RTC v. Teem Partnership, 770 F.Supp. 1439, 1146 (D. Colo. 1991); Oliver v. RTC, 747 F.Supp. 1351, 1356 (E.D. Mo. 1990), aff'd, ___ F.2d ___, 1992 WL 13283 (8th Cir. 1992); FDIC v. Carter, 1990 WL 209626 p. 1 (W.D. Okla. 1990). Muller could have easily protected his property interest by requiring modification of record of the debt instruments securing the obligation of Van Puffelen to Great Southern, to limit Great Southern's lien interest in the dock tract to One Hundred Fifty Thousand and No/100

(\$150,000.00) Dollars, rather than relying on the Lee affidavit. Section 1823(e) (1989) does not deprive Muller of his property

interest; Muller deprived himself of such property interest "by failing to protect [himself]. . . ." Campbell Leasing, Inc., supra, at 1248. Cf. Griffin, supra, at 699. In this case there is no Fifth Amendment taking.

Muller also contends RTC's claim should be equitably subordinated to his claim pursuant to 11 U.S.C. §510.¹¹ To establish grounds for equitable subordination under 11 U.S.C. §510(c), it must be shown "(1) that the claimant has engaged in inequitable conduct; (2) that the conduct has injured creditors or given unfair advantage to the claimant; and (3) that subordination of the claim is not inconsistent with the Bankruptcy Code." In re: Holywell Corp., 913 F.2d 873, 880 (11th Cir. 1990). The burden of proof is on the party asserting inequitable conduct to establish with "material evidence" that the claimant, here Great Southern, engaged in some unfair conduct. Id. Muller maintains it is

inequitable for RTC to recover all of the proceeds from the sale of

¹¹11 U.S.C. §510(c) provides in part as follows:

[T]he court may --

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or a part of an allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the [bankruptcy] estate.

the dock tract when he relied on the representations of Great Southern that it would not enforce its lien on the dock tract beyond One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars, and that this alleged inequity is grounds for subordination under 11 U.S.C. §510(c). However, Muller presents no evidence of unfair conduct on the part of Great Southern or its agent. The fact that the terms of the Lee affidavit are unenforceable by operation of law against Great Southern's successor in interest, RTC, pursuant to 12 U.S.C. §1823(e) (1989), does not support equitable subordination of RTC's claim under 11 U.S.C. §510(c).

As RTC's lien interest, unaffected by the Lee affidavit, exceeds the total of the proceeds held in the registry of the court, RTC is entitled to turnover of the Three Hundred Twenty Thousand and No/100 (\$320,000.00) Dollars held in the court registry.¹² Muller's claim in the underlying Chapter 11 case is based solely on his security interest in the proceeds from the sale of the dock tract. Van Puffelen is not personally liable on the June 1, 1987 note. Because the proceeds from the sale of the dock tract are insufficient to satisfy the claim of the first lien holder and pay any amount of Muller's lien, Muller has no lien and therefore no

¹²As Van Puffelen's outstanding indebtedness to Great Southern exceeds the value of its lien interest (see footnote 3, supra), Great Southern is not an oversecured creditor and is not entitled to attorneys' fees and costs pursuant to 11 U.S.C. 506(b).

claim in the underlying Chapter 11 case.¹³

Savannah Marine objects to Muller's proof of claim in its Chapter 11 case. A proof of claim properly filed is deemed allowed unless a party in interest objects. 11 U.S.C. §502(a). A party objecting to a claim has the burden to go forward with evidence sufficient to defeat the claim. Matter of Uneco, Inc., 532 F.2d 1204 (8th Cir. 1976); In re: WHET Inc., 33 B.R. 424 (Bankr. Mass. 1983). The ultimate burden of proof substantiating the claim remains with the creditor. Matter of Mobile Steel Co., 563 F.2d 692 (5th Cir. 1977).¹⁴ Savannah Marine produced sufficient evidence to meet the initial burden of going forward with evidence to dispute the proof of claim filed by Muller in In re: Savannah Marine Services Inc., supra. The ultimate burden of proof substantiating the claim remains with Muller. Mobile Steel Company, supra;

¹³RTC raised the issue of whether Muller's security interest in the dock, "personal property" according to RTC, is perfected under Georgia law. It is undisputed that Great Southern perfected its lien on the dock tract to the extent of Van Puffelen's indebtedness, as evidenced by various debt instruments described in footnote 3. Muller concedes Great Southern perfected its lien before he perfected his lien. Having determined the Lee affidavit is unenforceable against RTC, RTC is entitled to turnover of the entire Three Hundred Twenty Thousand and No/100 (\$320,000.00) Dollars held in the court registry and Muller's lien, perfected or not, is extinguished by the sale of the collateral and my determination that RTC is entitled to all of the proceeds from the sale. Therefore, I do not address the issue of the perfection of Muller's security interest in the dock.

¹⁴The Eleventh Circuit has adopted all decisions rendered by the Fifth Circuit on or before September 30, 1981 as binding precedent in this circuit. Bonner v. City of Pritchard, Ala., 661 F.2d 1206 (11th Cir. 1981).

Brantley v. FmHA (In re: Brantley), Ch. 13 case No. 90-30050 slip op. at 3 (Bankr. S.D. Ga. Dalis, J. July 11, 1991). Savannah Marine contends Muller's claim based on its guaranty of the June 1, 1987 note should be limited to Sixty-Four Thousand Three Hundred Forty-Eight and No/100 (\$64,348.00) Dollars. Savannah Marine does not dispute its guaranty up to One Hundred Thousand and No/100 (\$100,000.00) Dollars or that the outstanding indebtedness on the June 1, 1987 note exceeds One Hundred Thousand and No/100 (\$100,000.00) Dollars. Savannah Marine contends that under the stock purchase agreement the outstanding indebtedness on the June 1, 1987 note, must be reduced by the shortfall on the promised commission revenues for 1987, Sixty Two Thousand Five Hundred Fifty-Six and 87/100 (\$62,556.87) Dollars by Savannah Marine's calculation, which, according to Savannah Marine leaves a claim of Sixty-Four Thousand Three Hundred Forty-Eight and No/100 (\$64,348.00) Dollars. However, having made a factual determination that the commission revenues for 1987 were at least Three Hundred Ten Thousand and No/100 (\$310,000.00) Dollars, I find Muller has sustained his burden of proof under 11 U.S.C. §502(a).

It is therefore ORDERED that judgment is entered for plaintiff, Resolution Trust Corporation;

further ORDERED that the Clerk is directed to pay to Resolution Trust Corporation Three Hundred Twenty Thousand and No/100 (\$320,000.00) Dollars, plus all accrued interest thereon less

any fees or costs due the Clerk, held in the court registry as proceeds from the sale of the dock tract; further ORDERED that debtor John C. Van Puffelen's amended objection to the claim of Joseph C. Muller in the underlying Chapter 11 case is sustained and the claim is disallowed; further ORDERED that debtor Savannah Marine Services, Inc.'s objection to the claim of Joseph C. Muller in In re: Savannah Marine, Ch. 11 case No. 90-41093 LWD, is overruled; Muller's claim is allowed as an unsecured claim in the amount of One Hundred Thousand and No/100 (\$100,000.00) Dollars in the Savannah Marine case.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at August, Georgia
this 31st day of March, 1992.